NO. 2709-A

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
a Corporation,
Plaintiff in Error,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

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STATEMENT OF FACTS

This is an action brought to recover taxes claimed to be due under an act of the Territorial Legislature.

Congress passed an act relating to the fisheries of Alaska in June 1906, the first section of which reads as follows:

"That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the act of March third, eighteen hudred and ninety-nine, entitled " 'An act to define and punish crimes in the district of Alaska, and

to provide a code of criminal procedure for the district,' " and amendments thereto."

In August, 1912, Congress passed the Organic Act, providing among other things for a Territorial Legislature. This act reads as follows: (The pertinent portions are in Italics.)

(PUBLIC—NO. 334.)
(H. R. 38.)

An Act to create a legislature in the Territory of Alaska, to confer legislative power thereon, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ALASKA TERRITORY ORGANIZED.—That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—*That the Constitution of the*

United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court

of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so that one member of the senate shall, after the first election, be elected bienially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications

as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route.

SEC. 5. ELECTION OF MEMBERS OF THE LEGISLATURE.—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elctions for the election of such members shall be held on the Tuesday next after the firest Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result

of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of eleciton to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.

SEC. 6. CONVENING AND SESSIONS OF LEGISLATURE.—*That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years* unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not continue in session longer than fifteen days. The gov-

ernor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the Unitd States, or when any public danger or necessity may require it.

SEC. 7. ORGANIZATION OF THE LEGISLATURE.—That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as "president of the senate" and in the case of the house of representatives as "speaker of the house of representatives," and by the elction by each body of the subordinate offices provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation by Congress.

SEC. 8. ENACTING CLAUSE—SUBJECT OF ACT.—That the enacting clause of all laws passed by the legislature shall be "Be it enacted by the Legislature of the Territory of Alaska." No law shall embrace more than one subject, which shall be expressed in its title.

SEC. 9. LEGISLATIVE POWER.—LIMITATIONS.—*The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsist-*

ent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall

be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divroce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government, nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division

thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided,* That all authorized indebtedness shall be paid in the order of its creation, *all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.* No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year; *Provided,* That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any

force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislation in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

SEC. 10. RULES, QUORUM, AND MAJORITY.—That the senate and house of representatives shall each choose its own officers, determine the rules of its own procedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attendance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present.

SEC. 11. LEGISLATOR SHALL NOT HOLD OTHER OFFICE.—That no member of the legislature shall hold or be appointed to any office which has been

created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

SEC. 12. EXEMPTIONS OF LEGISLATORS. — That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way.

SEC. 13. PASSAGE OF LAWS.—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated,

shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.

SEC. 14. THE VETO POWER.—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns

sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.

SEC. 15. PAYMENT OF LEGISLATIVE EXPENSES.—That their shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the Governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

SEC. 16. LAWS TRANSMITTED TO PRESIDENT AND PRINTED.—That the Governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States;

and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory.

SEC. 17. ELECTION OF DELEGATES.—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fourteen, and every second year theafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided,* That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further,* That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.

SEC. 18. CREATING RAILROAD COMMISSION.—That an officer of the Engineer Corps of the United States Army, a geologist in charge of the Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commissions hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission.

SEC. 19. That the Committee on Territories of

the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairman of said committees.

SEC. 20. LAWS SHALL BE SUBMITTED TO CONGRESS.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

Approved, August 24, 1912.

In the year 1915, the Territorial Legislature passed a revenue bill reading as follows: (The pertinent portions are in Italics)

AN ACT to establish a system of taxation, create revenue and provide for collection thereof, for the Territory of Alaska, and for other purposes; and to amend "An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF ALASKA.

Section 1. *That any person, firm or Corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows*:

1st. Attorneys at Law, Doctors and Dentists: Ten dollars per annum.

2nd. Automobiles: Five dollars per annum.

3rd. Bakeries: Fifteen dollars per annum.

4th. Electric Light and Power Plants selling light and power to the public: One-half of 1 per cent. of the gross receipts in excess of twenty-five hundred dollars.

5th. Employment Agencies: Operating for hire and collecting a fee from employees, five hundred dollars per annum.

6th. Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents per case on Medium Reds or Sockeye;
case on Medium Reds; one cent per case on all others.

7th. Salteries: Two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring.

8th. Fish Traps: fixed or floating, one hundred dollars per annum. So called dummy traps included.

9th. Gill Nets: One dollar per hundred fathoms or fraction thereof.

10th. Cold Storage Fish Plants: Doing business of one hundred thousand dollars per annum or more, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, and less than one hundred thousand dollars, three hundred and seventy-five dollars per annum; doing a business of fifty thousand and less than seventy-five thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand and less than fifty thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars and less than twenty-five thousand dollars per annum, fifty dollars per annum; doing a business of four thousand, and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The "Annual Business" under this section shall be considered the amount paid per annum for the product.

11th. Laundries: Doing a business of over five thousand dollars per annum, twenty-five dollars per annum.

12th. Meat Markets: Doing a business of not less than ten thousand nor more than twenty-five thousand dollars per annum, ten dollars per annum; doing a business of not less than twenty-five thousand nor more than fifty thousand dollars per annum,

thirty dollars; doing a business of not less than fifty thousand dollars nor more than seventy-five thousand dollars per annum, one hundred dollars per annum; doing a business of not less than seventy-five thousand nor more than two hundred thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of over two hundred thousand dollars per annum, five hundred dollars per annum. That every separate meat market or establishment shall be considered a separate business.

13th. Mining: One per cent. of the net income in excess of five thousand dollars. By "net income" is meant the cash value of the output of the mine less operating expenses, repairs and betterment actually done. By "Mining" is meant any operation by which valuable metals, ores, minerals or marketable stone is extracted from the earth.

14th. Public Scavengers: Fifty ($50.00) dollars per annum.

15th. Ships and Shipping: Freight and Transportation Ocean and Coast-wise Vessels doing business for hire plying in Alaska waters, registered in Alaska and not registered elsewhere in the United States and not paying a tax or license elsewhere, and freight and passenger lines propelled by mechanical power registered in the Territory of Alaska and not paying a license or tax elsewhere in the United States, and river and lake steamers and barges as well as transportation lines doing business wholly within the Territory of Alaska, one dollar per ton on

net tonnage, custom house measurement of such vessel.

16th. Telephone Companies: One-half of one per cent. of gross receipts in excess of Fifteen ($1,500.00) Hundred Dollars.

17th. Water Works: Selling water or power to the public, one-half of one per cent. of gross receipts in excess of Twenty-five ($2500.00) Hundred Dollars.

18th. Public Messengers: Twenty-five ($25.00) dollars per annum.

Section 2. Every person, firm or corporation desiring to engage in any of the lines of business specified in Section One, shall first apply to and obtain from the Territorial Treasurer a license. If the tax for the license applied for is a fixed sum, the amount of such license tax shall accompany the application. If the amount of the tax is not a fixed sum, the applicant shall state in his application that he agrees to pay the license tax, and will make a true return and will pay to the Treasurer such tax on or before the 15th day of the next ensuing January. The applicant shall also state that the name of the person, firm or corporation making the application, the line of business to be licensed, and the place where said business will be carried on. Upon receipt of the application in proper form, the Treasurer shall issue the license as of the date of the application, and the applicant may carry on the business from and after the date the application is actually made. All

license taxes, except those where the tax is a fixed one, shall be due and payable on December 31st of each year, and must be paid on or before January 15th following. And it shall be the duty of the person, firm or corporation engaged in any of said lines of business, to make a return under oath, to the Treasurer on or before January 15th of each year, setting forth the name of the license, the number of the license, and all the facts regarding the business, necessary to enable the Treasurer to determine the amount of the tax to be paid. And all applications for renewals of such licenses shall be made on or before January 15th of the calendar year for which such renewal is made.

Provided: Any person, firm or corporation now engaged in any of the lines of business specified in Section one shall comply with this Act or before July 1st, 1915, by applying for the license (and paying the tax if a fixed sum) for the calendar year ending December 31st, 1915, and all taxes for the current year shall be calculated for the year beginning January 1st, and ending December 31st, 1915.

Any person, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent added, for which the defendant was liable. Each month or fraction of a month in which business is carried on in violation of this Act shall be deemed a separate offense, and prosecution there-

for may be by information filed by the Attorney-General or other authorized legal counsel of the Territory in any court of competent jurisdiction, and upon conviction of the Court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil actions or by imprisonment at the rate of one day for each two dollars of such fine and costs. PROVIDED: That in any prosecution hereunder the Attorney-General or other authorized legal counsel of the Territory may, with the consent of the Governor, compromise the case by accepting from the defendant a sum not less than the tax, legal interest thereon and all costs and expenses.

The Territorial Treasurer is authorized and directed to prescribe suitable form for applications, licenses, returns and such other forms as may be necessary or proper to carry this law into effect. He shall distribute such forms to the public through the Clerks' of the Court and Marshal's offices in the several Divisions for use of those subject to the taxes herein laid.

Section 3. It shall be the duty of the Attorney-General or other authorized legal counsel of the Territory to enforce the provisions of this Act; and for that purpose, may with the approval of the Governor, employ such assistants as he may deem necessary, but the compensation for the service of such assistants shall be paid out of the fund recovered, and the Territory shall not be liable therefor in any event be-

yond fifteen (15) per cent. of the amount so recovered in each case; assistant counsel may, however, be employed at a previously agreed upon and stipulated fixed fee.

Section 4. Special remedies provided by this Act, or other Acts of the Legislature shall not be deemed exclusive, and any appropriate remedy either civil or criminal or both, may be involved by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions.

Section 5. All taxes levied, laid or provided for in this Act and penalties and interest accrued, are hereby declared to be a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments.

Section 6. It shall be the duty of the United States Marshals and Deputy Marshals in the Territory of Alaska to enforce the provisions of this Act in their respective precincts, districts or divisions and to report all violations thereof to the Governor, and under his direction file information, or take such proceedings as he may direct; and for the services so performed they shall be paid under the provisions of Section three hereof. And for all negligence or wilful failure to perform such duties, Marshals and Deputy Marshals shall be liable to the Territory for all losses sustained, which liabilities may be enforced in any appropriate proceeding. And in the enforce-

ment of this Act the Attorney-General or other legal counsel for the Territory and the Marshals and Deputy Marshals have the right to inspect the premises and all books and papers of the persons, firms or corporations claimed to be liable to the taxes herein laid, which right of inspection shall be enforced by the Courts upon application therefor.

Section 7. The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced.

Section 8. An emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval.

Approved, April 29, 1915.

This Act was passed by the Legislature on the 61st day after it had gone into session at between 3 and 4 o'clock in the morning, sun time, while the clocks in both houses indicated an hour prior to 12 o'clock, these having been stopped or turned back to so indicate.

The plaintiff in error owns and operates three salmon canneries in Southeastern Alaska. Some of the Salmon Canneries in Alaska are so situated, ow-

ing to natural conditions, that the salmon canned are caught by the use of seines, while others are so situated that seines cannot be used but fish traps must be employed for that purpose. The salmon canneries, of the plaintiff in error are so situated that it is obliged to employ fish traps in order to catch the salmon required at its canneries for canning purposes. All of plaintiff in error's canneries were operated by it during the year 1915 and during that season 19 fish traps were employed in catching the salmon canned by it at its canneries. None of the fish caught in any of these traps was sold until after it was canned. The plaintiff in error made no other use of its fish traps and paid its license taxes under the Act of June 1906, but did not apply for or take out a license under the territorial Act of 1915.

This action was brought to recover $1900.00 claimed to be due the Territory as taxes on account of the employment by the plaintiff in error of the 19 fish traps as related. Judgment was entered for the Territory in the amount sued for.

The cause was submitted to the lower court upon an agreed statement of facts and the only matters presented for review relate, first to the question as to whether the act of 1915 is a valid law, it being contended that this act is in so far as it relates to the facts in this case obnoxious to the provisions of the Organic Act of the Territory and also to the provisions of the Constitution of the United States, second, to the question of whether the plaintiff in error un-

der the facts as stated, became liable to the Territory for taxes because of the provisions in the Act of 1915 in so far as they relate to fish traps, and third, to the further question of whether in any event, it could be held so liable in view of the fact that the fish traps were mere appliances used in connection with the salmon canning business for which a license tax was required and paid in lieu of all other taxes and licenses under the provisions of the act of June, 1906.

ERRORS ASSIGNED AND RELIED UPON.

The following errors are assigned and relied upon for a reversal of the judgment:

First, That the court erred in overruling the demurrer of the defendant to the plaintiff's complaint.

Second, That the District Court for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its conclusion of law Conclusion of Law No. 1 as requested by the defendant, which is in words and figures as follows:

"Conclusion of Law No. 1, as Requested by Defendant.

That the Act of the Territorial Legislature of the Territory of Alaska entitled, 'An Act to establish a system of taxation, create revenue,

and provide for the collection thereof for the Territory of Alaska and for other purposes, and to amend an act entitled, " 'An Act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and for other purposes, approved May 1, 1913, and declaring an emergency' ", which said act was approved May 29, 1915, and forms the basis of this action is inoperative, invalid and void, as far as it relates to the facts in this case."

Third, That the District Court, for the Territory of Alaska, Division Number One, erred in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a matter of law from the facts found and to adopt as its Conclusion of Law, Conclusion of Law No. 2 as Requested by Defendant, which is in words and figures as follows:

"That the defendant is not indebted to the plaintiff in any sum whatsoever, and that the complaint should be dismissed and the plaintiff recover nothing by reason thereof."

Fourth, That the District Court, for the Territory of Alaska, Division Number One, errer in failing and refusing at the request of the plaintiff in error, The Alaska Pacific Fisheries, to conclude as a Matter of Law from the facts found and to adopt as its Conclusion of Law Conclusion of Law No. 3, as

Requested by the Defendant, which is in words and figures as follows:

> "That the defendant should have judgment against the plaintiff for its costs and disbursements in this behalf incurred."

Fifth, That the District Court, for the Territory of Alaska, Division Number One, erred in adopting as its Conclusion of Law and in concluding from the facts stipulated and found, as follows:

> "And from the foregoing facts and stipulation the court concludes as a matter of law that the plaintiff is entitled to judgment for the sum of $1963.00 and costs."

Sixth, That the District Court, for the Territory of Alaska, Division Number One, erred in rendering Judgment herein for the Plaintiff in the sum specified or in any sum whatsoever.

ARGUMENT

All of the errors assigned raise practically the same questions and can therefore be discussed together. The first question presented relates to the validity of the Act of 1915 as determined by the provisions of the Organic Act and those of the constitution of the United States. The second question presented is whether the provisions of the act of 1915 relating to fish traps are such as would require the plaintiff in error to apply for and obtain a license under the facts in the case. The third question deals with the liability of the plaintiff in error in view of the fact that its fish traps were used as appliances employed in connection with the canning business, for the conduct of which the act of June, 1906, required a license, which it is provided shall be in lieu of all other licenses and taxes. These will be discussed in their order.

1.

THE VALIDITY OF THE ACT OF 1915 IN VIEW OF THE LIMITATIONS PLACED UPON THE POWER OF THE LEGISLATURE BY THE ORGANIC ACT AND THE CONSTITUTION.

(a) In the Light of the Organic Act

The act purports to be a revenue act designed to raise revenue by requiring the payment of a fixed sum in each of the enumerated cases for a license.

It is entitled "An Act to establish a system of taxation, create revenue and provide for the collection thereof etc." Section one provides "That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows:

8th. Fish Traps: Fixed or floating one hundred dollars per annum. So called dummy traps included."

In order to consider the validity of the act in so far as it relates to the matters in dispute it is necessary to ascertain the meaning of the language employed, in so far as it relates to such matters. That the sole object of the act is the collection of revenue is not disputed. It is conceded that the amount sued for is sought to be recovered as taxes due under the provisions of the act. It remains to be seen, however, whether the tax sought to be collected is a specific tax on property or a tax on a business generally referred to as a license tax. It is obvious that the tax is not an ad valorem tax, but belongs to one or the other of the two classes named. Its validity will therefore be considered from both view points:

(a 1.) Viewed As a Specific Property Tax.

Whatever power is possessed by the Territorial Legislature of Alaska is derived from the Organic Act. Congress has under the constitution plenniary power to legislate for the territories. It may either

exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska it has in part only delegated its powers in this regard to the Legislature of the Territory by the Organic Act.

The Organic Act of a territory is a grant of legislative powers. In that respect it does not differ from the charter of a municipal corporation or the constitution of the United States. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent power. It is a mere territory of the United States and its legislature is the creature of the congress; like other legislative bodies similarly created it is endowed with such powers only as are conferred upon it.

The Organic Act contains a provision similar to the general welfare causes ordinarily contained in the charters of municipal corporations. This provision reads as follows:

"The Legislative powers of the Territory shall

extend to all rightful subjects of legislation not inconsisted with the constitution and laws of the United States."

Under it the power to raise revenues by means of taxation is in a general way, subject to the limitation elsewhere imposed, conferred; but since legislative grants are strictly construed, the powers thus conferred in a general way must be exercised in strict conformity with the specific requirements of the Organic Act itself and in strict subordination to the limitations imposed.

The Organic Act contains the following provision: "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.

It will be observed that under this provision all taxes must be uniform and must be assessed according to value. Viewed as a specific tax on property the tax in question fails to comply with the provision quoted in that it is not assessed according to value. Each fish trap including dummy traps being taxed $100 regardless of its value. In this connection it may be observed that it was agreed (see record p. 24) that some of the traps of the plaintiff in error were worth as much as $10,000.00 while others did not exceed $1000 in value. The tax therefore if considered as a tax on the fish traps must be regarded as not being assessed according to actual value in direct violation of the provisions of the Organic Act.

That it was the intention of the legislature to lay a specific property tax on fish traps becomes apparent when the language employed is considered. Any other construction would not only make the meaning of the provision so uncertain as to render it void on that account, but would do violence to the language itself. The act provides that those engaging in the following lines of business shall pay a license tax, then follows an enumeration which includes the following: "8th: Fish Traps: Fixed or floating one hundred dollars per annum. So called dummy traps included." Now a fish trap is not a line of business, but a device employed in catching fish. A fish trap is tangible property and the fact that it is enumerated as a line of business does not make it such.

The learned trial Judge expressed the opinion that what the legislature meant was, quoting from the opinion, "that whoever conducts the business of fishing by means of fish traps must pay the license required." Not only is there no reason for asserting that this is what the legislature meant to say, but upon examining the act it will be seen that this is the one thing the legislature did not mean to say. The act provides that there shall be paid for each fish trap, whether fixed or floating, the sum of one hundred dollars per annum—so called dummy traps included. It does not matter whether the trap is fixed or floating nor does it matter whether the trap is a dummy trap or one used to catch fish, the tax is the same in any case.

Now dummy traps are not used to catch fish, they are as the name indicates mere dummies. The learned trial Judge, in the opinion, correctly and clearly defines a dummy trap as follows: "A dummy trap is a sham trap not used for fishing but designed simply to squat on and hold a trap location." The owners of dummy traps may not be engaged in the business of fishing at all. They may be persons engaged in seeking out and locating by means of dummy traps favorable trap locations with a view of selling these locations to persons engaged in fishing. Yet under the act they would be obliged to pay the tax of one hundred dollars on each dummy trap. The fact that a tax is required on a trap not used in fishing shows clearly that the tax was not intended to be imposed on the business of fishing by means of traps because these traps connot be so employed.

The learned trial Judge disposed of this matter by saying that it was immaterial whether the tax imposed on dummy traps was a valid tax, since the traps referred to in the cause on trial were not dummy traps. This however is no reply to the argument advanced. Reference is not here had to dummy traps for the purpose of ascertaining whether the tax on these traps is a valid one, but for the purpose of ascertaining the intention of the legislature in taxing fish traps generally. Dummy traps are placed in the same class with other traps and the character of the tax imposed on dummy traps is the same as

that of the tax imposed on other traps. Hence, since the legislature could not intend the tax imposed on dummy traps to be a tax on the business of fishing with dummy traps as the latter cannot be employed in fishing, the legislature did not intend the tax on other fish traps to be a tax on the business of fishing therewith.

Again under the construction placed on the act by the learned trial Judge the line of business sought to be taxed is changed from the fish trap business or the business of "fish traps" to the business of fishing; that this construction is not in accord with the legislative intent is evident from the fact that the 6th line of business enumerated is that of the fisheries. If this tax had been intended as a tax on the fisheries it would have been dealt with under that head. Nor does it seem reasonable that the legislature intended to impose two separate taxes on the fisheries at least not by a single enactment.

Independent of these considerations there is not as much reason for saying that the fish trap business means the business of fishing by means of fish traps as there would be for saying that it means the business of trading in or buying and selling fish traps, or the business of building fish traps or the business of designing or inventing new kinds of fish traps or any other business that relates to fish traps.

In common parlance the business of fishing with fish traps would be referred to as the fishing business, while the phrase fish trap business would be

applied to one engaged in the business of buying and selling or trading in fish traps. Similar phraseology is frequently employed and the meaning attached thereto is always the same. Thus if one were referred to as being in the farm implement business no one would take it that such a one was engaged in farming by means of farm implements, but all would at once know that such a one was a dealer in farm implements. So one engaged in the horse business is one engaged in buying and selling horses, not one who carries on this or that business in which horses are employed. Many other instances where this phrase is commonly employed readily suggest themselves, and in every case reference is had to one buying or selling the thing the name of which is thus connected with the word business.

Whatever else may be said upon this subject, this much is certain that unless the tax be regarded as a specific tax on property, the whole matter becomes involved in a maze of uncertainty. The legislature cannot have had reference to the business of fishing with fish traps as dummy traps are classed with the others and dummy traps cannot be used in fishing, but just what the legislature referred to no one can tell. Many lines of business relate in one way or another to fish traps and the term fish trap business fits one almost as well as it does any of the others. A consideration of the whole law makes it clear that the legislature intended to place a specific property tax on fish traps of one hundred

dollars each regardless of whether the traps were used in catching fish or not. An attempt to place any other construction upon the act merely leads to confusion and is unwarranted by the language employed.

Nor would the construction contended for by the learned trial Judge help the matter out any. If that construction were adopted the tax sought to be collected would still remain a specific tax on property. To say that those engaged in the business of fishing by means of fish traps shall pay a tax of one hundred dollars on each trap, does not change the character of the tax from a tax on the fish trap as property to a tax on the business of fishing by means of fish traps, as a business. It merely limits the persons liable to pay a tax on fish traps to those engaged in fishing by means of such traps. The tax still remains a specific property tax on fish traps to be paid only by those employing such traps in connection with the fishing business. The tax does not become a tax on the business but remains a tax on the traps at the rate of one hundred dollars for each trap. To say that one engaged in a given business shall pay a fixed tax on part or all the property used in connection with the conduct of such business does not relieve the tax imposed of its character as a tax on property. If this would result one engaged in farming by the use of horses could be taxed at a fixed rate per horse regardless of its value or any farmer could be taxed at a fixed rate per acre of land farmed regardless of

its value. A railroad company engaged in the transportation business by means of cars and locomotives could be taxed at a fixed rate for each car or locomotive regardless of its value. In fact all the tools, implements and appliances used or employed in connection with the various industrial pursuits could in this manner be taxed without regard to their value. Indeed every species of property could in this manner be subjected to a specific tax levied without regard to the value of the thing taxed, except only such property as is not used or employed for any purpose whatever. No property would be protected by the provisions in the organic law that all taxation shall be according to value, except property that is absolutely useless. A theory that leads to such conclusions cannot be regarded as sound. Regardless of the angle from which this tax is viewed, therefor, it is and remains a specific tax on property.

The view taken by the Supreme Court of the United States, however, concerning the nature and effect of license taxes makes it a matter of very little importance whether this is a direct tax on property or a tax on the business in which the property is employed. That court held that a tax on the business of a peddler selling goods of a given character must be regarded as a tax on the goods sold by such peddler. It would follow therefore that a tax on the business of fishing by means of fish traps must be regarded as a tax on the fish traps employed in such business.

Welton v. State of Missouri, 91 U. S. 278. The state of Missouri passed a law exacting a license from peddlers selling merchandise manufactured outside of the state. This act was held to be an interference with interstate commerce and void. It was urged that the license tax was required from the peddler and was not a duty imposed upon the goods he sold; that the goods were the subject of interstate commerce and not the peddler, that for this reason the license tax did not interfere with interstate commerce, but the court held that a license tax exacted for the sale of goods was in effect a tax upon the goods themselves. In passing upon this question, Mr. Justice Fields, speaking for the Court, says:

"The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the

goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

While the state courts have held that license taxes on business were not property taxes, they have uniformly held that where a business was taxed and the amount of the tax was measured by the property employed, the tax could not be regarded as a license tax on business but must be regarded as a tax on property.

Standard Oil Company v. Commonwealth, 82 *S. W.* 1020.

Pittsburg, Cincinnati & St. Louis Railroad Co. v. State Ohio, 30 *N. E.* 435.

Pittsburg Railroad Co. v. Pittsburg, 60 *Atl.* 1080.

City Brookfield v. Toory, 43 *S. W.* 387.

Ellis v. Frazier, 63 *Pac.* 642.

The case of Standard Oil Company v. Commonwealth arose in the State of Kentucky. The legislature of that state had passed a law, in all respects like the Alaska Statute now before the court. Subdivision 4 of Article 10 of the chapter of the Kentucky statute relating to revenue and taxation, under the head of "Amount of License Tax" enumerated a large number of occupations, etc., which were required to pay a license tax and in this enumeration occurred the following: "to each oil depot in this state wherein petroleum, lubricating or other oils are stored in bulk or tank, ten dollars."

The constitution of the state of Kentucky contained a provision requiring all property taxes to be assessed according to value, but allowing the imposition of license taxes. (The full text of the constitutional provisions relating to this subject is elsewhere set out in this brief.) The question therefor arose whether this was a license tax or a property tax. If a property tax the constitution required it to be according to value. If a license tax it might stand since the constitution expressly provided that license taxes might be assessed notwithstanding this constitutional requirement. It will be noted that the tax here, as in the case at bar, was designated a license tax and that the language contained in the enumeration of the things on which such a tax was imposed in so far as it related to the oil depots, is in all respects similar to the lanuage relating to fish traps as contained in the Alaska act.

The Supreme Court of Kentucky held that notwithstanding the language of the statute, the tax was a property tax and void because it was not assessed according to value. In passing upon this question the court say: "The imposing of an arbitrary sum of ten dollars as a tax upon each oil depot in this state without regard to their value would be a most palpable violation of these sections of the constitution. It is altogether improbable that every oil depot of the state is of exactly the same value, or if they were, when taxed as property they could not be taxed either a greater or less per cent of their

value than other property subject to taxation is made to bear."

The case of Pittsburg, Cincinnati and St. Louis Railroad Company v. State arose in the state of Ohio. The legislature of that state had passed an act requiring every corporation or company operating a railroad, or any part of a railroad, within the state to pay to the Commissioner of railroads and telegraphs a fee of $1.00 per mile for each mile of track operated by it within the state. It was contended that this was in fact an exaction of a fee under the police power. The court, after reviewing the decisions of the Supreme Court of Ohio on the subject, held that in Ohio all taxes must conform to the constitutional provisions relating to taxes; that the money exactions not required to conform therewith were those exacted under the police power and those only. It was then held that the exaction in this case was a tax on property notwithstanding the fact that it was called a fee; that it lacked uniformity and was not assessed according to value, as required by the Ohio constitutional provisions, which are elsewhere in this brief set out at length. In passing upon this question the Supreme Court of Ohio says:

"What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of $1 per annum; the statute calls it a 'fee,' but its nature is not affected by the name that may be assigned to it.

It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum, leviel upon all the farmers of the state, for each acre of land of which they may be seized, or each head of horses or other live stock that they may own. In both instances the tax is levied upon property, but it is neither levied 'according to its true value in money' nor uniformly upon all property; both of which are constitutional requirements, if it is a tax within the constitutional meaning of that word. That it is such a tax we think there can be little, if any, doubt. A tax is a 'pecuniary burden imposed for the support of the government . . . . Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes.' The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the Act to which it is supplementary, to indicate a purpose that the fund shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax."

The case of Pittsburg Railroad Company v. Pittsburgh arose in the State of Pennsylvania. The city of Pittsburg had passed an ordinance entitled, "An Ordinance establishing and levying license taxes for general revenue purposes upon street railways, telephone, telegraph, elctric light, or power, water, gas and heat companies or corporations doing business in the City of Pittsburgh, regulating the collection of the same and imposing penalties for default in payment." The ordinance provided among other things, "that there shall be established and levied an annual license tax upon each and every street railway company or corporation the sum of twenty five cents per foot for each lineal foot of track laid, maintained or operated by such company or corporation within the limits of the city of Pittsburg exclusive of such track as may be in the yards or buildings of such company or corporations."

The city of Pittsburg had authority to impose license taxes, but the Supreme Court of Pennsylvania held this tax to be a property tax upon the tracks of the railroad companies notwithstanding the fact that it was called a license tax and held the ordinance void. In passing upon this question the Supreme Court of Pennsylvania say: "What the act of the Assembly authorizes the city to levy and collect is a license tax or fee and the ordinances are so worded. They term the tax assessed against the appellee a "license tax"; but no matter what the municipal

authorities call it, the question is, "What is it?" The tax is 25 cents per foot "for each lineal foot of track laid, maintained or operated" by the appellee within the city of Pittsburg exclusive of such tracks as may be in its yards or buildings. The tracks of a street railway company are as much its property as are its power houses, car barns, or repair shops; and if so could it be seriously argued that an annual tax of 25 cents per lineal foot on a car barn would not be a tax on the property no matter by what name called, especially if to be collected for the general revenue purposes of the municipality? Manifestly it would be such a tax and such is the character of the tax which the appellant would impose on the tracks of the appellee."

The case of the City of Brookfield v. Toory was decided by the Supreme Court of Missouri. The city of Brookfield passed an ordinance requiring merchants to pay a license tax the amount of the tax required in each case was one per cent. upon the cash value of the stock of goods, wares and merchandise kept on hand for sale. The tax was held to be a property tax and not a license tax and the ordinance held void because a property tax of this character could not be levied by the city. In passing upon this question, the Supreme Court of Missouri say: "In a word can this tax of one per cent. upon the cash value of the goods on hand be held as an occupation or privilege tax. After a careful investigation of the question mooted and most ably discussed by

counsel, it seems palpable that this is a property tax pure and simple. It is an obvious mis-nomer to call it a tax upon occupation. While cities of the third class may exact a license tax upon occupations or callings the tax thus exacted must be upon the privilege itself and not a plain ad valorem tax upon property as this ordinance levies."

The case of Ellis v. Frazier arose in Oregon. The Legislature of Oregon has passed an act imposing a tax of $1.25 on bicycles within certain counties. The owner of a bicycle was required to pay $1.25 in return for which he received a tag to be attached to the bicycle. It was urged that this was a license fee. The court decided that fees exacted under the police power were the only money exactions that were not required to conform to the constitutional provisions of Orgon which require uniformity and require property taxes to be assessed according to value. (The Oregon constitution is quoted at length elsewhere in this brief.) And it was further held that this tax was a property tax and since it was not assessed according to value as required by the constitution, it was void. Several other matters are discussed in this case, but reference to these will be had elsewhere in the brief.

A—2. VALIDITY OF THE TAX WHEN VIEWED AS A LICENSE TAX.

The power of the legislature to levy or collect taxes, does not exist as an inherent power but because of a grant contained in the Organic Act and must, as was said when the validity of specific property taxes was being discussed, be exercised in strict subordination to the provisions in the Organic Act expressly limiting that power.

The act requires that "ALL TAXES SHALL BE UNIFORM UPON THE SAME CLASS OF SUBJECTS AND SHALL BE LEVIED AND COLLECTED UNDER GENERAL LAWS AND THE ASSESSMENTS SHALL BE ACCORDING TO THE ACTUAL VALUE THEREOF." This provision requires all taxes to be uniform upon the same class of subjects, requires all taxes to be levied and collected under general laws and requires all taxes to be assessed according to the value of the thing which is the subject of taxation—under it there must be uniformity, there must be an assessment and the tax must be based upon value. Again, the provision applies to all taxes meaning each and every tax; its effect is nowhere limited to property taxes, nor does it contain an exception in favor of licenses taxes.

The tax in question violates each of these requirements. In the first place it can not in any sense be regarded as uniform upon the same class

of subjects. It was stipulated in this case that the plaintiff in error is operating salmon canneries so situate owing to natural conditions that it is obliged to resort to the use of fish traps to catch its fish supply. It is further stipulated that other canneries in Alaska are so situate because of natural conditions that they catch their fish supply by resorting to the use of seines for that purpose. All these canneries sell their fish in the same market. A tax upon the fish traps imposes a burden on the product. The same thing results if the construction placed upon the act by the learned trial Judge is adopted and the tax is regarded as a license tax imposed upon those engaged in fishing by means of fish traps. In that event the class of subjects on whom the tax is imposed are those engaged in fishing and since seines are not taxed under the act and no tax is imposed on those engaged in fishing by means of seines, those engaged in fishing by means of fish traps are discriminated against in favor of those engaged in fishing by means of seinies.

This precise question came before the Federal court in a case that arose in Nebraska. Lincoln Gas Co. v. City, 182 Fed. 927. A license tax was imposed upon a gas company's furnishing light, heat and power to the inhabitants of the City of Lincoln, Nebraska, and a smaller license tax was required from electric light companies furnishing light, heat and power to the citizens of the same city. The court held this tax invalid because it was not

uniform in its operation on the same class of subjects as required by the Nebraska Constitution.

In this connection it must be added that in determining upon the validity of acts of this character the court may consider inequalities that arise as a result of the law when placed in actual operation. This under the authority of the case of Yick v. Hopkins, 118 U. S. 635.

Nor does the law comply with the provision that there must be an assessment for no assessment of any kind is provided for. The principle objection, however, to the tax is that it is not assessed according to the value of the thing taxed. Viewed from any standpoint the tax is a specific tax and does not take into consideration at all the value of the thing which is the subject of taxation.

The learned trial Judge, however, was of the opinion that this was a license tax, and that taxes of this character could be levied without complying with the requirements of the provision referred to, notwithstanding the fact that by its express terms "all taxes" without exception are made subject to the requirements mentioned. This view is based upon an erroneous conception of the effect of some of the decisions of the state courts.

These decisions were rendered in states having a variety of constitutional limitations and restrictions upon the taxing power, all unlike the provision contained in the organic law of Alaska. Of course the effect of a limitation contained in the organic

law of any state or territory must depend in each case upon the language of the provision containing the limitation; and the decisions of the courts relating thereto must be read in the light of the language of the provision construed.

By many of the state constitutions license taxes are expressly provided for or excepted from the operation of the requirements of uniformity and assessment according to value. By others the provisions containing these requirements are expressly limited in their application to property taxes. By the organic law of Alaska all taxes, without exception, must comply with the requirements of uniformity and assessment according to value. An examination of the decisions upon which the opinion of the learned trial Judge is based will disclose the fact that they can all be distinguished for one or the other of the reasons given except only those cases which relate to licenses exacted for the purpose of regulation under the police power as distinguished from license taxes exacted for the purpose of revenue under the taxing power. These cases of course rest upon an entirely different principle.

Where in the interest of the public health, the public morals or the public safety it becomes necessary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary, it may

also require the payment of a license fee sufficiently large to pay the costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purpose mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the police power of the state. In the exercise of the police power the legislature is of course not restricted by limitations placed upon the taxing power and it is for that reason that the validity of laws exacting license fees is not effected by provisions in the organic law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public morals or public safety, in imposing license taxes the object and aim of the legislature is the collection of revenue. In character a license tax does not differ from any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of revenue

for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

The collection of a property tax can be enforced by a seizure and sale of the property taxed. Collection of a license tax cannot be thus enforced because of the intangible character of the occupation or business which forms the subject of the tax. The only practical method by which the collection of this tax can be enforced consists in providing that it shall be an offense to pursue the occupation or business taxed without first paying the tax.

The procedure followed is similar to that pursued in the collection of license fees under the police power. A license is required but this license performs no office except that it serves as a receipt for the taxes paid. When a license is granted under the police power it serves as a permit to do that which without the license would be unlawful because of its harmful effect upon the public health, public morals or public safety if permitted to be done without the restraint of the license and proper regulation thereunder—a right is conferred upon the recipient of the license which he did not have before it was issued. When, however, a license is issued to one in connection with the payment of a license tax no new right is conferred upon the recipient. The occupation or business licensed is not one which requires regulation and restraint in order to prevent

injury to the public health, morals or safety, but is a useful one by which the public health, morals and safety as well as the public welfare are promoted. The recipient of the license had a right under the constitution to follow an occupation or business of this character without a license just as one has the right to the ownership and enjoyment of private property without a license. In exacting the license tax the government merely exercises its right to levy a tax against the occupation or business of the citizen for the purpose of defraying the expense of government, just as it levies a tax against the property of the citizen for such purpose. Nothing more, nothing less. There is no difference between a license tax and a property tax. The apparent difference arises from the fact that in one case the thing taxed is tangible, in the other intangible which necessitates different methods of procedure when it comes to enforcing collection. Both are taxes in every sense of the word and being taxes must conform to the requirement of the organic law as to uniformity and assessment according to value unless, indeed, the provisions containing these requirements differ from those contained in the organic act of Alaska in that they are so worded as to be limited to one or to exclude the other.

There is no similarity between license fees exacted under the police power and license tax exacted under the taxing power, although the method of procedure for their enforcement may be the same.

As was said by Judge Cooley in his work on taxation, page 396, "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power."

It will be seen therefore that the decisions that relate to license fees exacted under the police power have no application to the facts in this case. (Throughout this discussion the nomenclature found in most of the cases upon the subject is followed; that is to say money exactions under the police power are referred to as "license fees" while those under the taxing power are referred to as "license taxes." In some of the cases the terms, license fees, license taxes and occupation taxes are all used, sometimes interchangeably, where money exactions under the police power are referred to.)

The various provisions contained in the organic laws of the various states and territories will next be discussed with a view of determining the applicability and effect of the decisions under each.

The constitution of the State of Alabama contains the following provisions: "All taxes levied on property in this state shall be assessed in exact pro-

portion to the value of such property . . . . . The legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the State of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state."

The constitution of the State of Arkansas provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

The constitution of the State of Florida provides as follows: "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property . . . . . The legislature may also provide for levying a special capitation tax and a tax on licenses."

The constitution of the State of Illinois contains the following provisions: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the

value of his, her or its property, such value to be ascertained by some person or persons, to be selected or appointed in such manner as the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests, or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

The constitution of the State of Idaho contains the following provisons: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, or her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax . . . . . All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation of all property, real and personal."

The Montana Constitution provides as follows: "The necessary revenue for the support and mainte-

nance of the state shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

The constitution of Nebraska contains the following provision: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the Legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, uniform as to the class on which it operates."

The constitution of the state of Louisiana contains the following provision: "Taxes shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in proporition to its value." Provision is also made for a license tax, to be graduated upon persons pursuing the several trades, professions, vocations, and callings. All occupations may be liable to such tax

except those of clerks, laborers, clergymen, school teachers, those engaged in mechanical, horticultural, agricultural, and mining pursuits, and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco, cigars, and cottonseed oil.

The constitution of the state of North Carolina provides as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property . . . . . And provided, further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."

The constitution of the state of Texas contains the following provision: "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mining and agricultural pursuits, shall never be required to pay an occupation tax."

The constitution of the state of Tennessee provides: "All property shall be taxed according to its

value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they from time to time direct."

The constitution of the state of Utah provides as follows: "The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money . . . . . Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages."

The constitution of the state of Virginia provides as follows: "All property, except as hereinafter provided, shall be taxed, all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws . . . . . The General Assembly may levy a tax upon incomes in excess of $600 per annum; may levy a license tax upon any business which cannot be reached by the ad-valorem system."

The constitution of the state of West Virginia contains the following provision: "Taxation shall

be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be asecrtained as directed by law . . . . . The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

The constitution of the State of Kentucky contains the following provisions: "Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. All property shall be assessed at its fair cash value. All property, whether owned by natural persons or corporations shall be taxed in proportion to its value . . . . . The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

The organic act of the Territory of Oklahoma provides as follows: "Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value: Provided, That nothing herein shall be held to prohibit the levying and collecting license or special taxes in the

territory from persons engaged in any business therein, if the legislative power shall consider such taxes necessary."

It will be observed that the constitution of each of the states above referred contain express provisions authorizing the collection of license taxes. The language employed varies, but in each case it is clear that the framers of the constitutions intended to authorize the legislature to impose and collect license taxes for the purpose of revenue as distinguished from license fees exacted in connection with the requirement of a license for the purpose of regulation. It is needless to say that the courts in the states above mentioned have uniformly held that the legislature had the power to raise revenue by means of a license tax. Even in the states mentioned, however, it has been quite generally held that license taxes must be uniform upon the same class of subjects.

While the decisions of the courts under constitutions containing express provisions authorizing the enactment of laws requiring license taxes can have no application to a case arising under the organic act of Alaska, where no such provision exists, it is a noteworthy fact that the framers of these constitutions deemed it necessary to insert these express provisions in order to reserve the right to collect revenue by means of license taxes. Obviously they took the position that the insertion of the provisions with reference to uniformity and assessment accord-

ing to value would destroy the right to collect license taxes unless that right was expressly reserved. No other reason can be assigned for the action taken.

A consideration of the Oklahoma organic act discloses the fact that Congress also took the view that unless the right to collect revenue by means of license taxes was expressly reserved, that right would be destroyed by the insertion in the organic act of a provision requiring uniformity and assessment according to value. Had it been the intention of Congress to permit the Alaska Legislature to raise revenue by means of license taxes it would have taken the same action that it took in the case of Oklahoma and reserved that right by a similar provision. The failure of Congress to reserve to the Alaska Legislature this right is, however, easily accounted for.

An examination of the organic act will disclose the fact that the powers conferred upon the Alaska Legislature are everywhere limited and circumscribed and the limitation upon the power to levy taxes without reserving the right to raise revenue by means of license taxes is in harmony with the general purpose of Congress to limit the power of the legislature as expressed by the organic act, taken as a whole. The sparsely settled condition of the territory, its vast extent and other peculiar conditions not met with elsewhere are the reasons that suggest themselves for thus limiting the power of the Territorial Legislature. In denying the right to raise revenue by means of license taxes, Congress

must had had in mind not only the peculiar conditions existing in the territory, but also the unusual provisions of the organic act with reference to representation in the legislature made necessary because of these peculiar conditions. Under the provision of the organic act each judicial division, regardless of its population, or wealth, is allowed four representatives in the lower house and two in the upper house of the legislature; that this arbitrary apportionment of the ~~members~~ number of representatives to which the various parts of the territory should be entitled in the legislature might lead to serious abuses in connection with the imposition of license taxes, must have been apparent to Congress.

The industries carried on in the territory are such that each is carried on in its own peculiar locality and not elsewhere, at least not to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. The temptation of working for and voting for a license tax on an industry not carried on in his division is constantly held out to each member of the legislature.

The mines and the fisheries form the basis of all industrial activity in the territory. The fisheries are located along the coast in the first and third divisions and the quartz mines also are located near the seashore in these same divisions, while the placer mines are found in that portion of the third division extending back into the interior and in the second and fourth divisions. Thus a license tax imposed

upon the fisheries burdens the coast regions of the first and third division only, a license tax on the quartz mines operations falls exclusively upon the same localities, while a license tax upon placer mine operations effects only the second and fourth divisions and that part of the third division which extends into the interior.

Not only must Congress be presumed to have had these things in mind but also the fact that a license tax is a convenient tax to impose and that its burdens fall upon a limited number only who are not always represented in the legislature, and that in imposing such taxes the legislature would only be following naturally along the lines of least resistance and greatest traction.

The members of the legislature that passed the law under consideration undoubtedly acted in the best of faith. They were undoubtedly honest men who acted honestly. Yet the injustice and inequality resulting from this character of taxation, regardless of the honesty and good faith with which it is invoked, and against which Congress undoubtedly intended to protect the people of Alaska, becomes apparent when the present law is examined.

The legislature never made any provision for the levying of any property tax whatsoever. All the money required to pay the expense of the Territorial Government is sought to be collected by means of license taxes. No substantial license tax is exacted from anyone engaged in any industry except the

mines and fisheries. Nor are all the mines taxed, the mines are not taxed unless they yield a net income in excess of five thousand dollars per annum. The low grade character of the quartz mines makes it necessary to employ larger units in connection with their operations. Enormously large capitals are required to successfully operate these mines, and of course, if the operations prove successful, the income is correspondingly large, so that the five thousand dollar exemption makes no practical difference one way or the other. The placer mines on the other hand are operated in small units so that while there are comparatively few quartz mines in operation the number of placers in operations is almost infinite, and while the aggregate yield of the placers may exceed that of the quartz mines, the yield of any one placer is comparatively small and does not except in isolated cases produce a net income of more than five thousand dollars. And even where the net income exceeds five thousand dollars it must always be a difficult matter to collect a tax thereon in view of the fact that, ~~it~~ as is a matter of common knowledge, ~~that~~ accurate books of account are rarely kept in connection with the conduct of small individual enterprises. It follows that under this law the fisheries and the quartz mines situated along the coast in the third and first divisions are called upon to pay all but a very small per cent. of the taxes required to meet the expense of the Territorial Government. This in spite of the fact that the

fisheries are also required to pay a tax to the federal government under the act of June 1906 and the quartz mines are required to pay a tax to the federal government of three dollars per stamp under the act of Congress.

The constitutional provisions in any wise similar to the provision in the Organic Act of Alaska, found in the various state constitutions, and unaccompanied by other express provisions limiting their effect so as to have no application to license taxes or providing in express terms for the imposition of license taxes, will next be considered together with the decisions of the state courts thereunder:

The constitution of the State of California contains the following provisions:

> "all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things, real, personal and mixed, capable of private ownership."
>
> "The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authori-

ties thereof the power to assess and collect taxes for such purposes."

The constitution also expressly provides that income taxes may be assessed and collected.

The provisions of the constitution of California first above quoted are not only expressly limited in their application to property taxes, but the meaning of the word "property" as therin used in expressly defined. Under the decisions of the state courts generally, which differ in that regard from the decision rendered by the Supreme Court of the United States in the case of Welton vs. State, 91 U. S. 278, hereinbefore referred to, license taxes are not regarded as taxes upon property. They are regarded as taxes upon occupations, and these occupations are in turn regarded as intangible things separate and distinct from the property used in pursuing such occupations. Viewing license taxes in this light, constitutional provisions which are expressly limited in their application to property taxes, such as is the provision in the California Constitution above quoted, can have no application to license taxes, since these are not regarded as taxes upon property. There is then in the California constitution no provision to which license taxes must conform. The decisions under that section of the constitution prohibiting the imposition of taxes on counties, cities, etc., however, shed light upon the meaning of the words "all taxes" as employed in the Organic Act of Alaska.

The legislature of the State of California had

passed a law requiring those engaged in certain kinds of businesses to take out a license and pay therefor fixed sums which were to be turned into the county treasury. This law was before the Supreme Court of California in the case of People vs. Martin, 60 Cal. 153. Its validity was assailed on the ground that the legislature had no power under the constitution to collect taxes for county purposes. It was contended that the license tax imposed was not a tax within the meaning of the constitution. It will be observed that the constitutional provision is not limited in its application to property taxes in that the taxes prohibited are those "upon the inhabitants or property thereof." This clause in the constitution, the Supreme Court of California held included not only property taxes, but also license taxes which were taxes upon the inhabitants. This act was held void. In passing upon this matter, Judge Ross, who was then a member of the Supreme Court of California, speaking for that Court, says:

> "The important question in the case is, whether or not the word 'taxes' as used in this section of the constitution includes license taxes; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of Section I of Article XXII of the same instrument.
>
> "That the license fees imposed by the pro-

visions of the Political Code were so imposed mainly, if not solely, for the purpose of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on taxation, pages 396-7; 2 Dillon on Mun. Corp. Sec. 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

"But are they 'taxes' within the meaning of Section 12 of Article XI, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property; for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for as already observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature;"

This decision is especially applicable to the pres-

ent case in that it clearly shows the reason why some of the provisions in the various state constitutions are not applicable to license taxes. These provisions are limited to taxes on property by their express terms just as is the first provision above quoted from the California Constitution. But the provision before the Court in this case was not so limited but applied to taxes on the inhabitants and taxes on the property alike, which made it in all respects similar to the provision in the Alaska Organic Act, which is applicable by its terms to "all taxes" without regard to their character.

One of the judges then a member of the Supreme Court of California dissented from the majority of opinion, taking the same view that the learned trial court took in this case, that license taxes were to be distinguished from other taxes in some manner and were not to be regarded as included within constitutional provisions relating to taxes, a view that resulted from confusing license taxes exacted under the taxing power with license fees exacted under the police power.

The Supreme Court of California in rendering subsequent decisions, however adopted the views expressed by Judge Ross and concurred in by the majority of the court as law. See Ex Parte Schuler 139 Pac. 985. And the Supreme Court of Missouri in construing a constitutional provision containing the same language, as will be pointed out when the provisions of the constitution of that state are discussed, adopted the same construction.

The constitution of the State of Colorado provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regualtions as shall secure a just valuation for the taxation of all property real and personal."

Under this constitutional provision it has been held in Colorado that a license tax can be laid and collected. It will be observed that the constitutional provision contains the following "which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal." This provision of course by its terms is applicable only to property taxes.

The constitution of the State of Delaware provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws,"

The effect of this constitutional provision does not seem to have been passed upon by the Supreme Court of Delaware in so far as it affects license taxes.

The constitution of the State of Georgia provides as follows:

> "All taxes shall be uniform upon the same

class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It will be observed that under this constitutional provision all taxes, without regard to their character, are required to be uniform upon the same class of subjects. It is accordingly held by the Supreme Court of Georgia that license taxes must conform to this provision. It will be further observed that the requirement that taxes shall be ad valorem is expressly limited to property taxes. Under this constitutional provision therefor licenses taxes are excepted from the provision that taxes must be according to value. This constitutional provision therefore permits the levying of licenses taxes, though such taxes are not levied according to value, or ad valorem provided they are uniform upon the same class of subjects, and this has been the construction placed upon the provision by the Supreme Court of Georgia.

The Supreme Court of Georgia, however, went somewhat further and held that where a license tax on merchants was graduated in proportion to the volume of business transacted, the tax should be according to value, notwithstanding the fact that the constitutional provision requiring taxes to be ad valorem was limited expressely to property taxes. The Court say: "It is true that the clause cited in words applies to property, but in sense and spirit we think it covers a business tax scaled by the amount or value

of the business transacted." Johnson vs. Macon, 62 Ga. 645. In this case it was further held that a license tax law graded in proportion to the amount or value of business transacted as above indicated was not sufficiently uniform upon the same class of subjects.

The constitution of the State of Indiana provides as follows:

> "That the general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall provide such regulations as shall secure a just valuation for taxation of all property both real and personal."

The provisions of this constitution it would seem are clearly limited so as to apply to property taxes only. Nevertheless the Supreme Court of Indiana in the case of Henderson vs. London & Lancashire Ins. Company, 135 Ind. 24, held that a tax on the business of such foreign insurance companies as are doing business in counties having cities with paid fire departments, which tax is to create a fireman's fund, violates the constitutional provision requiring equality and uniformity of taxation as it applies only to a portion of the class of foreign insurance companies, and the power of the whole state is thus exercised on a portion of the class for the benefit of a small part of the citizens of a few cities of the state. This decision indicates the tendency of the courts to apply the constitutional provisions of this character to license taxes wherever possible.

The constitution of the state of Kansas provides as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempted from taxation."

This constitutional provision by its terms deals with taxation of property only and accordingly the Supreme Court of Kansas held that it did not apply to license taxes.

The constitution of the State of Maine contains the following provision:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just valuation thereof."

This provision like that contained in the Indiana Constitution is by its terms limited in its application to taxes on real and personal estate and does not therefor apply to licenses taxes.

The constitution of the State of Minnesota provides as follows:

> "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform

throughout the state . . . . . Laws shall be passed taxing all moneys, credits, investments, in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money."

It will be noted that the provision in this constitution requiring equality applies to all taxes alike, but that the remaining provisions requiring levies to be made according to cash valuation, and taxes to be assessed according to value are expressly limited in their application by the terms of the provision to property taxes. It was accordingly held by the Supreme Court of Minnesota that all license taxes must be uniform, and further that all taxes upon property must be assessed according to value. Willis v. Standard Oil Co., 52 N. W. 652-4; In Re Tax Delinquency in St. Louis County, 75 N. W. 970; Minces v. Schoenig, 75 N. W. 711;

In the case of Willis v. Standard Oil Company, the Supreme Court of Minnesota was called upon to pass on the validity of a law providing for the payment of a fee to inspectors of oils. All oils shipped in and used for illuminating purposes were required to be inspected and the inspector was, for such inspection, entitled to certain fees. The objection was made that the fees exacted were exacted for the purpose of revenue and that the measure was in fact a measure designed to raise revenue. The Court held if that were the object of the measure, it could not be sustained under the constitutional provision. The

court says: "It is also objected that the act is one levying a tax, and not a police regulation. Of course, under the constitutional provision requiring taxes to be as nearly equal as may be, and to be levied on a cash valuation, the law could not be sustained as a tax law. It can only be upheld as an exercise of the police power of the state;"

In the case of in Re Tax Delinquency in St. Louis County, the Supreme Court of Minnesota passed upon a law providing that mining companies might pay in the state treasury annually, in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which real estate such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, to-wit: For each ton of copper, fifty cents, and for each ton of iron ore mined, shipped or disposed of, one cent. The court held that under the Minnesota Constitution the act was void, and in passing upon the matter they say: "It would be difficult to conceive of a system of taxation more obnoxious to the Constitution."

In the case of Minces v. Schoenig, the court had before it an ordinance passed by the City of Winona which contained the provision that those who conducted bankrupt sales were to obtain a license and in addition to the payment of ~~such~~ a fee, justified under the police power, were required to pay a tax of two per cent. of the amount of the gross receipts.

In holding this ordinance void, the court says: "This mode of taxing is so palpably in conflict with Section 1, Article 9 of the Constitution which requires that all property on which taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The constitution of the State of Michigan contains the following provisions:

> "The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law . . . . . All assessments hereafter authorized shall be on property at its cash value.
>
> "The legislature shall provide for an equalization of a state board in the year 1851, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes."

The Supreme Court of Michigan held that the terms "specific tax" used in the constitution provision embraced license taxes, a license tax being of course a specific tax on business.

Under the constitution of the State of Massachusetts the legislature is empowered

> "to impose and levy proportional and reas-

onable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

The effect of this constitutional provision was before the Supreme Court of Massachusetts in the case of Portland Bank v. Apthorp, 12 Mass. 252-256. The legislature had enacted a law taxing banks one-half of one per cent. on the amount of their capital stock. In discussing the validity of this law in the light of the constitutional provision, the Supreme Court of Massachusetts hold that the tax could not be justified under the first part of the provision and in that connection the court say: "Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution."

It will be observed from the language quoted that the assessment of a license tax would be considered as prohibited under the constitutional provision if the first portion of the provision alone were considered, yet this portion of the constitution of Massachusetts does not ~~at~~ ag clearly and definitely apply to all taxes alike as does the provision in the Alaska organic law.

The tax in question was, however, upheld by the Supreme Court of Massachusetts on the ground that the subsequent portion of the provision in the Massachusetts constitution allowed the collection of excises on commodities. The term "commodity" was given a broad meaning, so broad indeed as to include everything on which a tax could be laid. The court justified its action in so construing the word "commodity" on the ground that the legislature had always so construed it since the adoption of the constitution itself thirty years ago. This was considered by the court as being sufficient evidence to show that the framers of the constitution must have intended to give this meaning to the word "commodity."

The constitution of the State of Mississippi provides as follows:

> "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value . . . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

It will be noted that the provision requiring uniformity and equality applies to taxes generally, while the remaining provisions are limited by their terms to property taxes.

The constitution of the State of New Hampshire gives the General Court power

> "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same."

Under this provision of course a license tax can be imposed as, "it is a tax," as the Supreme Court of California held in the case of People v. Martin, "upon the inhabitants." Nevertheless the Supreme Court of New Hampshire held that these taxes must be uniform. State v. Pennoyer, 65 N. H. 113; 18 Atl. 878. In this case the Supreme Court of New Hampshire had before it a law requiring physicians to procure a license and pay a stipulated amount therefor. The law did not apply alike to all physicians and was accordingly held void as lacking in uniformity.

The constitution of the State of Missouri contains the following provisions:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.

"All property subject to taxation shall be taxed in proportion to its value.

"The General Assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities the power to collect and assess taxes for such purposes."

It will be noted that this constitution, like practically all the other constitutions, and unlike the Alaska organic act, contains two separate provisions, one applying to taxes generally and the other to property taxes only. It is similar to the Alaska organic act in that all taxes are required to be uniform upon the same class of subjects. It differs from the Alaska organic act in that under it all property subject to taxation shall be taxed in proportion to its value, while under the Alaska provision "all" taxes must be assessed according to the value of the thing which is the subject of taxation. This constitutional provision is construed by the courts so as to carry out the meaning so clearly expressed and license taxes are included within the provision, where taxes generally are referred to and are required to be uniform upon the same class of subjects.

In the case of City of St. Louis v. Spiegel, 2 S. W. 839, it was held that license taxes must under the Missouri constitution be uniform upon the

same class of subjects. An ordinance had been passed by the City of St. Louis providing for a license tax of $25 on meat shops situate in one part of the city and $50 on meat shops situate in another part of the city. It was held that this license tax violated the constitutional provision requiring uniformity.

The constitutional provision providing that the legislature shall not tax counties, cities, etc., or the inhabitants or property thereof, for county, city, town or other municipal purposes, is in all respects like the provision that subject contained in the California constitution, and the Supreme Court of Missouri placed thereon the same construction previously placed on a similar provision by the Supreme Court of California. State Ex Rel Wyatt vs. Ashbrook 72 Am. St. Rep. 765.

It was claimed in this case that an act of the Missouri legislature requiring a license tax from department stores was void for two reasons. First that the legislature had no power to pass the law since two-thirds of the revenue derived under it was paid into the city treasury, the law being therefor designed to raise revenue for municipal purposes and being imposed upon the inhabitants of the cities. And for the further reason that it lacked uniformity in that it applied only to department stores. The Supreme Court of Missouri held that the act violated the constitution in both respects. This decision, like the decision by the Supreme Court of California, is

important in that it is held that the term "tax" when used in the constitution includes license taxes unless it is expressly restricted to property taxes. As in California the tax therein prohibited was any tax on the inhabitants or property. In Alaska the term used is "all taxes" which is equally comprehensive.

The constitution of the State of Nevada provides as follows:

> "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory."

This provision by its terms requires no more than a just valuation for taxation of all property, real personal and possessory, and has of course no application to license taxes.

The constitution of the State of New Jersey provides as follows:

> "Property shall be assessed for taxation under general laws and by uniform rules according to its true value."

This provision also is limited in its application to the taxation of property.

The constitution of North Dakota provides as follows:

> "laws shall be passed taxing by uniform rule all property according to its true value in money."

The terms of this provision also expressly apply to the taxation of property only.

The constitution of the State of Ohio provides as follows:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;"

It will be observed that the provisions in the Ohio constitution are such that they apparently relate to property taxes only yet the Ohio courts have persistently justified non-uniformity in connection with money exactions for licenses on the ground that they were exacted under the police power, indicating thereby that exactions under the taxing power would be required to be uniform.

The Ohio decisions are reviewed in the opinion in the case of Pittsburg, C. & St. L. R. R. Co. v. State, 30 N. E. 435. An act passed by the Ohio Legislature required every corporation or company operating a railroad or any part of a railroad within the state to pay to the Commissioner of Railroads and Telegraphs a fee of $1.00 per mile for each mile of track operated by it within the state. The constitutionality of this act was assailed on the ground that it levied a specific tax on property. It was contended that the money sought to be collected was a fee and not a tax and did not come within the constitutional inhibition. In support of this contention, it was urged that the Supreme Court of Ohio in a pre-

vious decision had held that a license fee exacted from gas companies did not come within the constitutional inhibition requiring uniformity. The Supreme Court of Oho reviewed this early decision indicating that the gas business was a business that required police supervision; that the law imposing the exaction upon the gas companies provided for numerous kinds of regulation and that the license fee required from the gas companies was required in order to pay the cost of this regulation under the police power. It was further shown that the decision of the court in that case was based upon that ground and the law sustained as an exercise of the police power. The court then proceeded to apply this theory of the law to the facts in the case. It was pointed out that the law under consideration did not provide for any regulation and that the exaction of $1.00 per mile was a tax pure and simple and that its nature as a tax was not affected by the fact that it was called a fee. The court say: "A tax is a pecuniary burden imposed for the support of the government . . . . . Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes. The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the

fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue."

The constitution of the State of Oregon provides as follows:

> "No tax duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxes shall be equal and uniform.
>
> "The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal . . . . . ."

It will be observed that the only provision in the Oregon constitution that applies to all taxes is the provision requiring equality and uniformity. The other provisions are expressly limited in their applicaton to taxaton of property, real and personal. All

that would be required of a license tax under this provision is equality and uniformity. Taxes on property, however, both real and personal are required to be in accordance with a just valuation.

In deciding the case of Ellis v. Frazier, 63 Pac. 642, the Supreme Court of Oregon was called upon to pass on the validity of a tax under the Oregon constitution. A law had been passed by the Oregon legislature requiring the owners of bicycles to pay a tax of $1.25, whereupon they were furnished with a tag indicating that the tax had been paid, which was to be attached to the bicycle for and on account of which it had been collected. It was contended that this was an exaction that did not come within the constitutional inhibition. But the court held it was a tax and that for that reason it was void as lacking uniformity since bicycle owners in certain counties only were required to pay it. And furthermore that it was a property tax and for that reason violated the constitutional inhibition that property taxes must be ad valorem or assessed according to value. In passing upon this question the Supreme Court of Oregon say: "As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is no inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations." (It must be noted that the

Supreme Court of Oregon used the term "license" and the term "occupation tax" interchangeably as referring to exactions under the police power and not to exactions under the taxing power; that what is usually spoken of as a license tax is not included within the meaning of either of the terms as used by the Oregon Supreme Court. This is evident from the context.) Continuing the court say: "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. 'The distinction between a demand of money, under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' Cooley, Tax'n. 396. It was held, in the case of In re Wan Yin (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expense attending the regulation of the business, the burden is a tax, and not a license." The court then proceeded to review other similar cases and continuing say. "Whatever the

rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license." It was then held that since bicycles differ greatly in value, the tax violated the provision requiring uniformity and equality. The court say: "The value of all bicycles not being the same, the tax of $1.25 upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted." As has been elsewhere shown in this brief the act was also held to violate the constitutional provision that property must be taxed according to value, the court holding that this tax was in fact a tax on the property itself.

Later on the Supreme Court of Oregon had occasion to pass upon the act of the legislature more or less similar in character, Reser v. Umatilla County, 86 Pac. 595. In this case the court had before it an act which required the nonresident owners of sheep bringing sheep into the state for pasturage or for the purpose of driving such sheep through the state, to pay a tax of a fixed sum per head. It was urged by the Attorney General that the exaction was made under the police power of the state and was not therefor subject to the limitations imposed by the constitution with reference to the collection of taxes. But the court held the exaction to be a tax and held the tax void as lacking in uniformity and as having been levied without regard to valuation. In the course of the opinion it say: "It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expense incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law, imposing a burden or tax upon persons or property, from the operation of the constitutional provision relative to taxation, it must have for its primary ob-

ject the granting of some privilege or the imposing of some restraint."

It will be noted that in each of these cases the law before the court levied a specific tax on property. Such taxes in common with all other taxes were required by the constitution to be equal and uniform, since the clause requiring equality and uniformity applied to all taxes alike and being property taxes they were required to be assessed according to value, since by the provisions of the constitution property taxes are required to be so assessed. However, since the constitutional provision requiring assessment according to value is expressly limited in its application to property taxes, there would seem to be no good reason why a license tax could not be collected in Oregon if such tax were equal and uniform unless the view were adopted expressed by the Supreme Court of the United States in the case of Welton v. State that these taxes on business were in effect a tax on the property employed in connection with such business. The Supreme Court of Oregon seems to have taken this view of the matter, for while the taxes before the court were not license taxes, but specific property taxes, the opinion in each case contains a discussion of the validity of specific taxes generaly including license taxes and leads to the conclusion that under the Oregon constitution no money can be exacted except in the form of ad valorem property taxes unless the exaction be made in the exercise of the police power of the state.

The constitution of the State of Pennsylvania provides:

> "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

This constitution contains no provision requiring assessment according to value, the only provision contained being one requiring uniformity upon the same class of subjects and this, like the provision in the Alaska Organic Act, applies to all taxes alike. Accordingly it is held by the Supreme Court of Pennsylvania that occupation or license taxes come within its requirements and must be uniform. Banger's Appeal 109 Pa., St. 79.

In this case the court had before it an ordinance of the city of Williamsport under which it was sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The ordinance was held to be invalid on two grounds: First, that the tax was in fact the income tax and that while the city of Williamsport had authority to levy occupaetion taxes, it had no authority to levy income taxes. Second, that the constitution of the state required all taxes to be uniform upon the same class of subjects; that the tax in question, regardless of its character, was not uniform upon the same class of subjects and was therefore void as failing to comply with this constitutional requirement. The court, discussed at

some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and the reason why the tax before the court did not answer this requirement. In referring to the opinion expressed by the lower court to the effect that the tax complied with the requirement of uniformity, the Supreme Court say: "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the organic law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform."

The constitution of the State of South Dakota provides as follows:

> "All taxation shall be equal and uniform. All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money."

It will be observed that the constitution contains a uniformity clause that applies to all taxes alike, while the clause requiring taxation according to value is limited by its terms to taxes on real and personal property. It was accordingly held by the Supreme Court of South Dakota that since the clause requiring equality and uniformity applied to all taxation, license taxes must be equal and uniform. In

Re Watson 97 N. W. 465. In this case the court had before it a law requiring a license tax from peddlers, exempting peddlers of nursery stock and other classes of peddlers from its operation. It was contended that this tax lacked uniformity and was therefor obnoxious to the constitutional provisions requiring uniformity in the case of all taxation. On the other hand it was argued that in some jurisdictions the uniformity clauses were not applied to license taxes. The Supreme Court of South Dakota however held that such contention could not be maintained under the provision of the constitution of that state, which did not expressly limit the requirement of uniformity to property taxes, but provided that all taxes must be uniform. In reference to this matter the court say:

"Such position cannot be taken in this state. The clause 'and all taxation shall be equal and uniform', found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this state, then, taxes on occupations must be equal and uniform."

The constitution of the State of Washington provides as follows:

"all property in this state, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

It will be observed that each and every provision contained in this constitution relative to taxation is expressly limited by its language to property taxes and can therefore have no possible application to license taxes under the view taken by the state courts that those taxes are not taxes on property.

The constitution of the state of Wyoming provides as follows:

"No tax shall be imposed without the consent of the people or their authorized representative. All taxation shall be equal and uniform. . . . . All property, except as in this constitution otherwise provided, shall be uniformlly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

It will be observed that the constitutional re-

quirement of equality and uniformity in Wyoming, as in South Dakota, applies to all taxation, while the provision requiring taxes to be assessed according to value is expressly limited to property taxes. There is therefore nothing in the constitution to prevent the exaction of license taxes provided they are equal and uniform.

In the case of State vs. Willingham, 9 Wyo. 290; 62 Pac. 797, a city ordinance was attacked on the ground that the license tax required was not uniform and was therefore in conflict with the constitution. The court reviewed the provisions of the ordinance and held that the tax imposed was in fact a uniform tax and satisfied the constitutional provision.

The constitution of the state of Wisconsin provides as follows:

> "The rule of taxation shall be uniform and taxes shall be levied upon all property as the legislature shall prescribe."

This constitutional provision is rather indefinite. Its effect was considered by the Supreme Court of Wisconsin in the following cases: Fire Department of Milwaukee v. Holvanstein, 16 Wis. 136; Morrill v. State, 38 Wis. 428; State v. Whitcom, 122 Wis. 110; 99 N. W. 468.

In the case of Fire Department of Wilwaukee v. Halvanstein, the court passed upon the validity of a law requiring foreign insurance companies to pay a per cent. of their premiums for the benefit of the

fire departments of some of the cities. It was contended that this was a tax and void since it lacked uniformity. But the Court held that the exaction was not a tax but a fee exacted by the state in the exercise of its police power and that the law was no more than a police regulation. The court say: "Nor is the requirement an exercise of the power of taxation as to the companies, but only a proper exercise of the police power inherent in the sovereignty of the state."

The decision in the case of Morill v. State relating to the validity of an act of the state legislature requiring hawkers and peddlers to take out a license and pay a fee therefor. It was claimed that this was an exercise of the taxing power and that for that reason the fee must be uniform. The court however held that the legislature had the authority under the police power to prohibit hawking altogether, and had the undoubted power to regulate its exercise, because hawking and peddling were regarded as unsavory lines of business. It was accordingly held that the act in question was enacted under the police power for the purpose of regulation and was not governed by the constitutional inhibitions relating to taxation. After quoting from Jacob's Law Dictionary, where hawkers are defined as deceitful fellows etc., and making the statement that it was not the intention to cast any reflection upon the parties before the court, in view of the fact that many honest men were in the business of peddling,

the court say: "but with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance, which could not otherwise be obtained into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason where the restriction or regulation of the buisness is an exercise of police power." This case was afterwards appealed to the Supreme Court of the United States as reported in the 154 U. S. 626. The judgment of the Supreme Court of Wisconsin was reversed. The Supreme Court of the United States do not discuss the case in the opinion any further than to say it was reversed on the authority of Welton v. State.

The decision in the case of State v. Whitcom deals with the validity of an act passed by the Wisconsin legislature requiring peddlers to procure a license and pay a fee therefor. Veterans of the Civil War and a number of others were exempted from the operation of the act. The court referred to two former cases decided by it, which leave the question as to whether a license tax could be exacted under the provisions of the Wisconsin Constitution in doubt and in view of the fact that that matter had not been argued in this case and the further fact that an expression on it was not necessary to the decision, the court refused to pass on it.

It was held that it was immaterial whether the license fee required under this law were viewed as

a tax or an exaction under the police power, as in either event the law would be void. If viewed as a tax it could not be sustained unless it was uniform upon the same class of subjects. If viewed as an exaction under the police power, it could not be sustained since it denied the equal protection of the laws, even though its object was to protect the public against irresponsible and deceitful traders. In the course of the opinion the courts say: "In considering the exemptions or partially disabled veterans of the civil war a quite unanswerable question arises, why, whether for purpose of taxation of police, they should be exempted any more than equally disabled veterans of other wars." And further on in the opinion it is said: "It seems neither necessary nor wise to carry further a critical anlysis of this statute. We have pointed out several respects in which it fails to impose its penalties upon persons not distinguishable from the appellant by any ligitimate classification. It therefore denies him the equal protection to which, both by Federal and State constitutions he is entitled, and cannot be valid as against him whether its purpose be taxation or regulation of conduct."

None of the other state constitutions contains a provision at all similar to the provision contained in the organic law of Alaska. A review of the various constitutional provisions limiting the power of taxation and the decisions thereunder discloses the fact that the courts have construed these provisions

just as they were written. In many of the state constitutions the provision relating to uniformity is not by its terms limited to property taxes, but like the Alaska provision is so worded as to apply to all taxation alike, and wherever such is the case it will be observed that the courts have generally, if not universally, held that the provision related to all taxation regardless of the character of the tax and that license taxes in order to be valid must be uniform in compliance with the constitutional provision.

It will be noted that no state constitution contains a provision similar to that found in the Alaska Organic Law providing that "all taxes" must be assessed according to value. The provisions in all the state constitutions requiring assessment according to value are expressly by their terms limited to taxes on property, and being so limited, the provisions can not and do not become material in discussing the validity of a license tax. But in the case of these provisions the courts also have given them effect according to, and construed them in accordance with, the exact language employed. While the language employed differs more or less in each case all these provisions provide substantially that property taxes shall be levied according to the value of the property taxed. And wherever a provision of this character exists the courts have held that the power of the legislature in connection with the assessment of property taxes is limited to taxes assessed according to value. That is to say, all specific property

taxes are done away with and such taxes are in all cases required to be ad valorem.

Since the decisions of the various state courts under these varying constitutional provisions do no more nor less than construe these provisions in accordance with the exact language employed, they do not and can not furnish any authority under which a construction can be placed upon the provisions of the Alaska Organic Act, which is not in accordance with its exact language. The Organic Law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. In this respect it is similar to the organic law of many of the states. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers to "all taxes," that is to say, each and every kind of a tax and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in accord with the decisions of the state courts rendered under similar constitutional provisions. But the provision in the Alaska Organic Act does not stop here, it requires more than uniformity. The language is, "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof. Under this provision then all taxes must be based upon an assessment and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains the provision that all taxes must be

assessed according to the actual value of the thing taxed. This provision is peculiar to the Alaska Organic Law. Many state constitutions provide that all property taxes shall be levied according to actual value, but none, that *all* taxes shall be so levied, or that any tax, other than property taxes, shall be so levied, ~~or that any tax, other than property taxes, shall be so levied.~~ Apply the rule of decision applied by the state courts under the provision that all taxes must be uniform to the provision in the Alaska Organic Law. It follows that all taxes which are not assessed according to the actual value of the thing taxed are void, for as was pointed out in discussing uniformity clauses, license taxes are taxes, and being taxes are embraced within the term "all taxes" which is at once the most comprehensive and the most all inclusive of any term that Congress could have employed. If this language does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them. The statement contained in the Alaska Organic Act is equivalent to the statement that no tax shall be collected which is not uniform upon the same class of subjects, and which has not been assessed according to the actual value of the thing taxed, and since no tax, except an ad valorem property tax, can conform to these provisions that is the only tax that can be levied and collected under the Alaska Organic Law. It may here be added that the ad valorem system of taxation is the only safe, reasonable

and just system. Under it property is taxed and not the use of it. Unlike the license tax system, it does not place a premium upon idleness at the expense of industry and where it is levied with uniformity it distributes the burden of taxation equally and fairly.

It is urged that the provision requiring assessment according to value can not have been intended to apply to license taxes because these taxes can not be assessed according to value. It is true that license taxes cannot be assessed according to value, but it does not follow that for this reason they can be levied under a provision in the Organic Law requiring "all taxes" to be assessed according to value. It simply follows that license taxes can not be imposed. To contend otherwise leads to the most ridiculous conclusions for if license taxes can be assessed under this provision for the reason that its terms are such that a license tax can not conform to it, then it must follow that any tax can be assessed which is of such character that it can not conform to the requirements of the provision and can not be brought within its terms.

A specific property tax which differs from a license tax only in that it is a specific tax on property whereas the latter is a specific tax on occupations, can not be made to conform to the requirements of this provision, for while it is a tax on property it is a tax of so much per article without reference to the value of the article, just as an occupation tax is a tax of so much on a given occupation without ref-

erence to the value of the occupation. It is this that makes it a specific tax. If a specific tax were made to conform to the constitutional requirement so as to be assessed according to value, it would cease to be a specific tax and become an ad valorem tax. No specific property tax therefor can conform to this requirement. Hence, if the provision is to be so construed as not to apply to taxes that can not be made to conform to it, specific property taxes are not within its terms and can be levied notwithstanding a provision that "all taxes" must be according to value.

What is said of specific property taxes is true of each and every kind of a tax, except an ad valorem property tax, for no tax except an ad valorem tax is assessed according to value. If therefore all kinds of taxes that can not be made to conform to this provision are to be considered as not coming within it and are to be allowed notwithstanding the fact that they are not assessed according to value, then any kind of a tax whatsoever, be its character what it may, may be levied notwithstanding the fact that it is not assessed according to value. That is to say, since no tax, except an ad valorem property tax, can be levied according to value, specific property taxes, license taxes and every other conceivable kind of a tax may be levied notwithstanding the constitutional provision that all taxes must be levied according to value, if it be conceded that the requirement of assessment according to value was not intended to apply

to taxes that are of such a character that they can not be made to conform to it. The adoption of this view therefore would entirely destroy the effect of the provision. It would be equivalent to saying that a provision that taxes must be assessed according to value applies only to ad valorem property taxes for these are the only taxes that can be made to conform to this provision. All taxes, if this contention is regarded as sound except ad valorem property taxes can of course be levied because these can not conform to the provision and ad valorem property taxes can of course be levied because these can not exist without conforming to the provision, so the provision becomes entirely meaningless and is left without any effect whatsoever.

The idea that the term "all taxes" does not include license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax, it is simply a specific tax upon occupation, just as a specific tax on property is a specific tax on property. Money exactions under the police power may be allusive and peculiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed therefor from the standpoint either of reason or authority, the term "all taxes" must be

held to include license taxes and since the tax sought to be collected in this action is not uniform upon the same class of subjects in that it discriminates against those canneries that are so situate, because of natural conditions, that they are obliged to use fish traps in order to secure their fish supply, in favor of such canneries as are so situate because of natural conditions that they can use seines for that purpose, and is not assessed according to value, since the question of value is not taken into consideration at all. All fish traps regardless of their value being assessed $100 each. In this connection attention is called to the fact that it is stipulated in the case that some of the fish traps on which this tax is sought to be collected are worth as much as $10,000.00, while others are not worth to exceed $1,000.00.

But the learned trial judge expressed the opinion that express authority had been conferred upon the legislature to exact a license tax. If such express authority exists it must exist because of the following provision in the organic act:

> "That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or

to the act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seven, nineten hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

In the first place it will be observed that this provision does not contain a grant of power. The provision taken as a whole is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the law in the Territory. It was deemed desirable to keep this law in force accordingly a provision was inserted against its repeal by the Territorial legislature. But in order that this provision might not be given a broader construction than was intended for it, it was provided:

"That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

The clause does not in any sense contain a grant of powers but is a mere statement inserted to prevent a provision containing a limitation upon the powers of the legislature from receiving too broad a construction.

Viewed, however, as an express grant of powers this clause does not confer the power to impose a license tax. A grant of power to require license authorizes the exaction of licenses under the police power for the purpose of regulation, but does not authorize the exaction of license taxes under the taxing power. The right to require the latter exists if it exists at all under the taxing power and must be exercised in subordination to the limitations placed upon that power by the organic law, the former exists under the police power and is controlled by the limitations placed upon that power by the organic law, without any reference whatsoever to the limitation relating to the exercise of the taxing power. The right to require a license and the right to impose a license tax are separate and distinct rights, bearing no relation to one another; and a grant of the former does not include the latter. Upon this the authorities are agreed.

Sunset Telephone and Telegraph Co. v. City of Medford 115 Fed. 202.
In re Laundry Licenses 22 Fed. 701.
Clark vs. Brunswick, 43 N. J. Law 175
Cache County v. Jensen 61 Pac. 303.
State v. Smith 35 Atl. 506 (Conn.) 52 Am. St. Rep. 301.

The case of the Sunset Telephone and Telegraph Company v. City of Medford arose before Judge Bellinger. The charter of the City of Medford, Oregon provided as follows:

"The city council shall have power to license, regulate or prohibit telegraph and telephone companies using the roads, streets, or alleys of the city and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall grant an exclusive right to any such company."

Under this provision in the charter the city passed an ordinance requiring telephone companies to pay one hundred ($100.00) dollars per annum as a license fee. The court held that the fee was so large that it was obviously a revenue provision and that it was therefore not within the authority conferred on the city by its charter. In passing upon the ordinance the court say:

"The ordinance complained of provides that no person shall engage in the telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of $100, and, when this sum is paid, the city recorder shall issue a license to the person, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person or company paying said license fee, during the year for which they have paid such license, shall have a right to occupy the streets and alleys with his

or its poles and wires, etc. This is a revenue provision, and is not within the authority conferred upon the city by its charter. 'The power to license, as a means of regulating a business implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it void.' Laundry License Case (D. C.) 22 Fed. 701. If the city has authority, under section 102 of the charter, to fix the compensation which shall be annually paid for such license or privilege to use the roads and streets of the city, then the city might have required the payment of the sum fixed by the ordinance for such use. But it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of its lawfully appointed officers. If so, the city cannot add new conditions to the grant after the company has accepted it and established its plant. If by the power to fix compensation is meant the compensation that the city is to receive for the license regulation, the case is within the rule of the Laundry License Case (D. C.) 22 Fed. 701, and the compensation to be fixed must not go beyond

the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainent, and while it may exact compensation for the license, it cannot, under the power given in its charter, make such compensation a matter of revenue."

The case of In Re Laundry License arose in Oregon. A city ordinance of the City of Portland required the proprietors of wash houses to pay a quarterly fee of five dollars, making an annual fee of twenty dollars. The charter of the city of Portland authorized the city to regulate wash houses, laundries, and the like, and another subdivision in the charter authorized the city to license and regulate all such callings, trades and employments not prohibited by law, "as the public good may require." The question before the court was whether these provisions in the charter authorized the license fee of twenty dollars per annum exacted from the proprietors of wash houses. The matter arose on a petition for a writ of habeas corpus. The petitioner had been convicted for violation of the Portland ordinance and, the case arose before Judge Deady. Judge Deady held that the city had under the provision quoted the power to license laundries, but that a license could be exacted only in connection with the exercise of the power to regulate, and that it could not be used as a pretense for raising revenue. The Court held that one dollar per year would be ample to re-imburse

the city for registering a license and that the fee of twenty dollars must be regarded as a revenue measure and therefore void.

The case of Clark v. New Brunswick arose in the State of New Jersey. The city charter of the city of New Brunswick empowered the city council to pass ordinances to license and regulate cartmen, hawkers, peddlers, auctioneers, pawnbrokers, junk and shop keepers and others. Under this grant of powers the city council of New Brunswick passed a license law very similar to the act passed by the Territorial Legislature. The act was held void on the ground that the power to exact a license tax was not conferred upon the city. In passing upon this matter, the court, speaking through Judge Van Sychel say:

> "Under such grant of power it has been repeatedly held in this state, the right of taxation for revenue purposes is not conferred. It is purely a police power and must be exercised for the purpose of regulation. The city may be incidently benefited by the imposition of fines and penalties, but they must be reasonable and appropriate to the regulation of the various pursuits enumerated. Any attempt to establish a fiscal scheme under the grant is without authority by law." Again the court quoting with approval from a former decision rendered by the Supreme Court of New Jersey say: "When authority is given to require the pos-

session of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else than a tax upon such business."

The case of Cache County v. Jensen arose in the State of Utah. The laws of the state authorized counties to require licenses for the purpose of regulation and revenue. Cache County imposed a license on those ~~grounds~~ engaged in herding sheep. The amount of the license fee exacted depended upon the number of sheep and was so large that it was evidently intended as a means of raising revenue. The ordinance requiring the license did not provide for any regulation so that it was on its face a revenue measure solely.

The Supreme Court of Utah held that under a grant of powers to the counties empowering them to require a license for the purpose of regulation and revenue, the counties had no right to require a license for the purpose of revenue only; that the grant merely empowered the counties to license for the purpose of regulation and that if revenue resulted incidently this was permissable.

The Court say: "So a right to license a business or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue the power to license for that purpose must be conferred in unequivocal terms. "License" in

general implies privilege and regulation and the imposition of it falls within the police power of the state.

In the case of State v. Smith, the court had before it an ordinance of the City of Bridgeport. The charter of the town of Bridgeport authorized the City of Bridgeport to license cartmen, truckmen, hackmen, butchers, bakers, petty grocers, hucksters and common victualers under such restrictions and limitations as said common council might deem necessary and proper to the health of the city, and to make other ordinances relative "to any and all subjects which shall be deemed necessary and proper for the protection and preservation of the lives of the citizens." The city council under this grant of power enacted an ordinance requiring a license from all milkmen. The court held that this ordinance was not authorized, under the general welfare clause, nor under the provision above referred to and was therefore void. The court say:

> "The right to license the pursuit of a lawful business, which as usually carried on does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignity. When conferred upon a municipal corporation, the grant can not be extended by any doubtful implication."

THE VALIDITY OF THE ACT AS AFFECTED BY THE FACT THAT IT WAS PASSED BY THE LEGISLATURE AFTER IT HAD BEEN IN SESSION MORE THAN SIXTY DAYS

The Organic Act provides as follows: "That the Legislature shall convene at the capitol at city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years."

It was agreed that the Legislature went into session at noon on March 1, 1915, and that the act was passed on April 30, 1915, between the hours of 3 and 4 in the morning sun time, and that the clocks in the halls of the legislature had been stopped or turned back so as to indicate an hour prior to midnight of the previous day. It was further agreed that no extra session was called.

It will be observed that the language of the act is mandatory in this regard. It is urged, however, that since the legislature convened at noon sixty days had not expired until noon of the day on which the act was passed. The answer to this is that the law knows no fractions of days, but in calculating time counts each fraction of a day as a whole day.

It is further urged that since the record kept by the Legislature shows the law to have passed on the

previous day, it must be presumed to have been then passed, as the records kept by a legislative body are conclusive upon the courts. The answer to this contetion is that if the legislature adjourns by operation of law at midnight, three or four hours before the act was passed, the record is not a record kept by a legislative body, since that body had adjourned and ceased to exist as such prior to the time the act was passed. The record that imports verity is the record of a legislature not the record kept by a body of men that at one time composed a legislature.

II.

THE VALIDITY OF THE ACT AS DETERMINED BY THE CONSTITUTION OF THE UNITED STATES.

It is contended that the provisions of the act are such as to deny to the Alaska Pacific Fisheries the equal protection of the laws and further that under it private property is taken without compensation and the Alaska Pacific Fisheries Company is deprived of property without due process. These propositions will be discussed in their order.

II—A.

AS DENYING THE EQUAL PROTECTION OF THE LAWS

It is agreed that some of the salmon fisheries operating in Alaska are so situated owing to natural conditions that the supply of fish necessary to keep

the canning plant in operation can be caught only by the use of seines, and that others are so situated owing to natural conditions that this supply can be caught only by resorting to the use of fish traps. It is further agreed that the Alaska Pacific Fisheries owns and operates three canneries in Alaska so situate, owing to natural conditions that it cannot use seines in catching the fish canned by it but is obliged to resort to the use of fish traps for that purpose. The act of 1915 does not impose a tax on seines or on those engaged in fishing by means of seines but taxes fish traps at the rate of one hundred dollars each. The learned trial Judge construed the act to levy a tax on those engaged in the business of fishing by means of fish traps, but for the purpose of this discussion it is not material which construction is adopted.

It is contended that this is an unjust discrimination in favor of the fisheries so situated because of natural conditions that they can catch their fish supply by the use of seines and against those so situated because of natural conditions that they are obliged to employ fish traps for this purpose. The product of one of these classes of fisheries meets the produce of the other class in the markets of the world. Here each must compete with the other. If one is required to pay a tax which the other is not required to pay, the product of the former exceeds the product of the latter in costs of production to the extent of the tax paid, for obviously any tax paid

by one carrying on such business, whether assessed against the business or against the appliance by which the business is conducted, forms a part of the cost of the product. If, therefore, one is obliged to pay a tax not required from the other, the more fortunate competitor is not only enabled to make a larger profit than the other, but he is enabled to undersell such other and if he desires to do so to drive him out of the market altogether and thus secure a monopoly for himself. The statement that one competitor having an advantage over others, regardless of the fact that such advantage may be slight, can drive such other out of the market and secure a monopoly for himself, finds ample support in the history of rate discrimination. Clearly it cannot matter whether the additional cost of the commodity offered in the market is due to an extra rate charged by a transportation company or to an extra tax charged by the government. In either case the result is unjust discrimination, the ultimate and natural effect of which is monopoly. A law which in its operation has this effect not only denies the equal protection of the laws but has the effect of abridging the privileges and immunities to which citizens of the United States are entitled. This precise question was passed upon by the Federal Court in the case of In Re Yot Sang, 75 Fed. 983.

This case arose in the state of Montana. The legislature of that state had passed an act requiring laundries that were operated by hand to pay a li-

cense of $25 per annum and requiring laundries that were operated by steam to pay a license fee of $15 per annum. It will be noted that the effect of this law is precisely the same as the effect of the Alaska License Law. The amount of the license fee is determined by the methods employed in operating the business. In Montana, laundries operated by hand were required to pay a license fee of $25. In Alaska, salmon fisheries operated by the use of fish traps are required to pay a license tax of $100 on each trap employed. In Montana, laundries operated by steam were required to pay a license fee of $15 per annum. In Alaska salmon fisheries operated by the use of seines are not required to pay any license fee whatsoever. This act of the State of Montana was held to be in violation of the Fourteenth Amendment and was declared void. The reasons given for the decision are as applicable to the facts in the case at bar as they were to the facts in the case then before the court. In the course of the opinion it is said:

> "It is urged, however, that where the same business is conducted by different modes, it is unjust, and in violation of the rule that each man should have the protection of equal laws, to place upon one a greater burden than upon the other. If the mode of conducting a business is subject to a license, then all progress could be delayed. It seems to me that in this case it appears that an additional burden is cast upon those conducting the business of a laundry oth-

er than by steam, where one or more persons are employed, than is imposed upon those conducting a steam laundry, and that no conditions are presented which would justify the state in adding this additional burden. It is therefore held that the arresting of Yot Sang for the refusal to take out a license, and pay therefor $25 before he could conduct a laundry business in which one or more persons were employed, the same being other than steam, was void, by virtue of the said Fourteenth Amendment to the Constitution."

The question of what constitutes a proper classification is well illustrated by the decision in a case that arose in Nebraska and was tried before the Federal Court there. A city council had passed an ordinance requiring a license tax from gas companies and also from electric light and power companies. The fee or tax exacted was not the same in each case. The electric companies and the gas companies both sold light, heat and power in the same city so that one was a competitor of the other, just as the salmon canneries in Alaska are of course obliged to sell their product in competition one with the other. The decision was not based upon any provisions of the Fourteenth Amendment but upon a provision contained in the Nebraska Constitution requiring uniformity of taxes upon the same class of subjects, and this is in effect what the Fourteenth Amendment requires. Under the provisions of the Fourteenth Amendment

it is not necessary that all persons, however situate, shall be taxed alike, but it is necessary that all those belonging to the same class shall be taxed alike and this was the requirement of the Nebraska Constitution. The Court held the ordinance void as being obnoxious to this provision of the Nebraska Constitution. Lincoln Gas Company, etc., v. City, 182 Fed. 927.

II—B.

UNDER ACT PERSONS ARE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS AND PRIVATE PROPERTY IS TAKEN WITHOUT COMPENSATION

It was agreed that while some of the fish traps of the Alaska Pacific Fisheries are worth as much as ten thousand dollars others are not worth to exceed one thousand dollars. The law taxes these traps at the rate of one hundred dollars each regardless of their value, so that the fish traps worth not to exceed one thousand dollars are taxed at the rate of ten per cent. To secure the payment of this tax the Territory is given a lien on the property taxed, under which it may be sold. This tax is so unreasonably high as to be confiscatory, its exaction deprives persons of property without due process and a sale of the property taxed to enforce payment of the tax amounts to nothing less than the taking of private property without compensation.

III.

WHETHER PLAINTIFF IN ERROR IS REQUIRED TO PAY A TAX UNDER THE PROVISIONS OF THE ACT

The plaintiff in error it is agreed is engaged in the business of operating three salmon canneries so situated because of natural conditions that it is obliged to resort to the use of fish traps in order to catch the fish required at its canneries for canning purposes. It is agreed that the plaintiff in error is not otherwise engaged in the fish trap business. Under this statement of facts the plaintiff in error cannot be said to be in the fish trap business or in the business of fishing by means of fish traps, it is engaged in the salmon canning business and the fish trap is a mere appliance used by it in carrying on that business. Just as a farmer using a plow to till his soil cannot be said to be in the plow business, but is engaged in the farming business notwithstanding the fact that the plow is one of the appliances used by him in carrying on that business, so a cannery man is engaged in the cannery business, notwithstanding the fact that a fish trap is one of the appliances used by him in carrying on that business.

IV.

WHETHER THE PLAINTIFF CAN BE LIABLE FOR TAXES UNDER ACT OF 1915 IN VIEW OF THE PROVISION OF THE ACT OF JUNE 1906 AND A COMPLIANCE THEREWITH

The act of June provides as follows:

> *"That every person, company, or corporation carrying on the business of canning, curing or preserving fish or manufacturing fish products . . . . . shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows. . . . . "*

No law passed since its enactment either by Congress or the Territorial Legislature contains any provision repealing it either in whole or in part. The plaintiff in error is engaged in the canning business and has paid the tax provided for on its product, which the act says shall be in lieu of all other taxes and licenses. The traps sought to be taxed in this case are mere appliances used in carrying on the salmon canning business on which the tax is paid in lieu of all other taxes and licenses. Clearly the laying of a tax against the appliances used in carrying on a business amounts to nothing less than a tax on the business in connection with which the appliances are used. To collect a tax on such appliances when no tax could be collected on the business

in connection with which they are used would be to do by indirection that which could not be done directly.

The judgment of the lower court should for the reasons urged be reversed. The tax laid under the act of the Territorial Legislature can not be considered other than a specific property tax, which fails to conform to the requirements of the Organic Act in that it is not uniform upon the same class of subjects, in that it is not based upon an assessment, and, in that it is not assessed according to value. But whether viewed as a property tax or a license tax does not materially affect the validity of the tax itself, for if regarded as a license tax it is also void for a failure to comply with these same requirements of the Organic Act. In no case is it uniform upon the same class of subjects, in no case is it based upon an assessment and in no case is it assessed according to value.

Again the tax is laid in violation of the provisions of the Federal constitution. Viewed as a property tax or a license tax it discriminates against those salmon canneries or fisheries who use traps to procure their fish supplies in favor of those using seines for this same purpose, and is confiscatory in its nature in that it exacts in some cases a tax as high as ten per cent.

Furthermore the law levying the tax is void because passed by the members of the legislature after the legislature had by operation of law adjourned.

Nor is the plaintiff in error engaged in a business that would make it subject to the tax sought to be imposed, it being engaged in the salmon canning business and not in the fish trap business. In any event the plaintiff in error, having paid a tax on its output as required by the act of congress, "in lieu of all other taxes," should not now be required to pay a tax on the appliances used by it in connection with its such business.

Respectfully submitted,

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